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SUPREME COURT, U. S.

No. 10-159

[redacted]

In the Supreme Court of the United States

October Term, 1911

[redacted]

Richard J. Thomson & Dept. Williams, petitioners,

v.

United States of America.

[redacted]

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-159

RICHARD J. DEUTSCH & BERT WILLIAMS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Following a non-jury trial in the district court for the Northern District of Illinois, petitioners were convicted of conspiring with Estley Maglott (named as co-conspirator but not indicted)[1] to misapply fraudulently the funds of the National Bank of Hyde Park in violation of 18 U.S.C. 656. Petitioners were each sentenced to 18 months' imprisonment and fined $5,000 plus costs of the prosecution (App. 3, 38).[2] The court of appeals affirmed (Pet. App. A).

[1] Maglott had previously pleaded guilty in 1965 to embezzling, misapplying and misappropriating bank funds (App. 59). He was the sole government witness in the instant trial.

[2] "App." refers to the petitioners' appendix in the court below, a copy of which is on file in this Court.

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1. The indictment, charging a conspiracy beginning about March 1, 1961 (App. 5), and continuing until July 30, 1963, was returned on July 25, 1968, five days before the running of the statute of limitations (App. 1).

The evidence at trial revealed that in the early part of 1961, Maglott, who was Assistant Vice-President of the Bank in charge of the installment loan department, was attempting to sell 31 junior mortgages which he had purchased for the Bank in June 1960. At that time, national banks were not permitted to hold second mortgages as collateral, and Maglott was told by the bank examiners to sell the mortgages (App. 60–61). During March or April of 1961, Maglott asked petitioner Deutsch to assist him in finding a purchaser for the mortgages. In early July 1961, Maglott suggested that Deutsch purchase the mortgages himself. Deutsch was to arrange with Harry Eager of the Illinois Mortgage Company to use the mortgages as collateral to secure a $20,000 loan for a down payment. Maglott also suggested that petitioners Deutsch and Williams form a company in order to obtain a $60,000 loan from the Bank to pay off the balance of the cost of the mortgages (App. 64–65).

On July 21, 1961, at a meeting which took place at the Bank, Eager gave Deutsch a $27,000 loan. A bill of sale was signed, transferring the mortgages to Deutsch, who then assigned them to Eager as collateral for the note. On the following day, petitioners met Maglott at the Bank and the $60,000 Bank loan was negotiated to Wildee Investment Company, the company formed by petitioners to purchase the mortgages (App. 67). A

checking account was opened for Wildee at the Bank and it was agreed that the check book and pre-signed checks would be left with Maglott, who would pay the $60,000 Bank loan and the $27,000 Eager loan from the payments made on the 31 junior mortgages (App. 67–68).

A string of fictitious home improvement loans were made by the Bank, through Maglott, to petitioners in order to meet the payments on the note to Illinois Mortgage Company.[3] The source of these payments was disguised by exchanges of checks (App. 68–76). Subsequently, a number of fictitious automobile loans were also made at the Bank (App. 77–79, 81–87). Part of the proceeds from these loans was used to make payments on other loans involved in this case and part was deposited in the Wildee account as payments on the junior mortgages (App. 79, 81–84, 155–156).

The addresses for the fictitious automobile loans were supplied by petitioner Williams. The proceeds from the first such loan was given either to John Spellers, an employee of Williams' real estate management company, or to Williams, who passed the proceeds on to Spellers (App. 76, 78–79). Spellers was subsequently involved in other fictitious automobile loans, always receiving about $100 for his services in exchanging checks (App. 81–84, 93).

On July 27, 1963, Maglott, using a check pre-signed by petitioners, withdrew $2,200 from the Wildee

[3] At one point (December 4, 1962), a withdrawal from the Wildee account was apparently used to meet payments on these "home improvement" loans (App. 88–89).

checking account (App. 93). At trial, he did not recall what this particular check had been used for (App. 184–185). Subsequently, the Bank auditor called Maglott and informed him that the Wildee account was overdrawn (App. 93). Maglott assured him that there would be a credit coming in the next day (App. 94). Maglott then called either petitioner Williams or Spellers. Spellers came to the Bank and an automobile loan was negotiated in his name. After an exchange of checks, $2,250 was deposited in the Wildee account on July 30, 1963, making the account again solvent (App. 94).

2. Petitioners contend essentially that the transactions on July 27 and July 30, 1963, were made without their knowledge and were not in furtherance of the conspiracy. Accordingly, they argue that the five-year statute of limitations had run with respect to any conspiratorial acts which could be charged to them when the indictment was returned on July 25, 1968. The proof at trial, however, justified the inference that the transactions of July 1963, which were typical means by which the conspirators covered their illegal activity, were in furtherance of the conspiracy.

The conspiracy was maintained through continued cooperation of Maglott and petitioners. When the loan accounts became delinquent, Maglott's role in the conspiracy was to cover up the fraudulent activity. At first, he used fictitious home improvement loans to petitioners. Later, he used fictitious automobile loans. Williams supplied addresses for loans and Williams or his employee, Spellers, participated in the necessary exchanges of checks. It is clear, more generally,

that Maglott, as the insider at the bank, impliedly, and necessarily, was given great leeway in manipulating accounts to cover the various delinquent loans and that the conspiracy contemplated that he have a fairly free hand in such dealings.[4] Cf. *United States* v. *Fellabaum,* 408 F. 2d 220, 224 (C.A. 7), certiorari denied, 396 U.S. 858. In these circumstances, it was proper for the trial court to conclude that the transactions of July 1963 were a part of the conspiracy.

3. Petitioners also assert that the pre-indictment delay in this case denied them their Sixth Amendment right to a speedy trial. In an affidavit in support of a pre-trial motion to dismiss the indictment, petitioner Deutsch stated, *inter alia,* that supporting books, records, and files had become lost or misplaced as the result of a burglary in 1963, a theft in 1965, a loss of certain records by an attorney handling a civil matter, and the natural disposal of old records of the various companies involved in the loans; and that, as a result of the delay, the defendants had been lulled into forgetfulness (App. 11–13). The motion was denied without a hearing. At trial neither petitioner testified.

The record does not show that the delay was the result of oppressive conduct on the part of the government. It was not until 1965, approximately two years after the commission of the last overt acts alleged, that Maglott, the central figure and the only person

[4] For example, neither petitioner Deutsch nor petitioner Williams ever made any payments on the "home improvement" loans (App. 91), and, as noted above, *supra,* n. 3, money from the Wildee accounts was, at one point, used to make payments on these loans.

who knew with whom he dealt and the purposes of these various loans, was apprehended (App. 96). While it is true that at Maglott's sentencing in 1965 the prosecutor stated that Maglott had talked to him and indicated his willingness to assist future prosecution, it was not until sometime between March 1966 and the end of that year—after Maglott was released from prison—that he discussed the general circumstances surrounding this case with a government official (App. 98). Petitioners were not discussed even then. The instant case was first specifically discussed by Maglott just six months prior to trial (App. 119–120).

Nor was the delay in this case prejudicial. The bulk of Maglott's trial testimony was based on bank records (App. 68–71, 73–75, 77–78, 80–83, 85–87, 93) which were equally available to the defense. Such records not only retain their reliability but also could have been used to refresh memories and to instigate investigations into the circumstances surrounding the various loans. Cf. *Tynan* v. *United States*, 376 F. 2d 761, 763 (C.A. D.C.), certiorari denied, 389 U.S. 845.

The court, moreover, did not abuse its discretion in denying a hearing on petitioners' motion to dismiss the indictment, and in proceeding to trial. Petitioners asserted they were unable, in any event, to reconstruct the events at issue. It was therefore proper for the court to determine whether there had been prejudice from the delay or whether it was purposeful on the part of the government on the basis of the evidence which would be developed at the trial, rather than to

hold a separate hearing which would duplicate much of that evidence.

We note, however, that the question whether an indictment may be dismissed because of preindictment delay is before this Court in *United States* v. *Marion and Cratch*,* No. 70–19, jurisdiction postponed to hearing on the merits, March 1, 1971 (401 U.S. 934). Accordingly, the Court may wish to defer disposition of the petition in this case, pending a decision in *Marion and Cratch*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

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* We are supplying counsel for petitioners with a copy of our brief in that case.